United States Circuit Court of Appeals

For the Ninth Circuit

No. 3935

S. L. SELIG, AS CLAIMANT OF THE GAS POWER BOAT "EAGLE," HER ENGINE, APPAREL, TACKLE AND FURNITURE, AND J. R. HECKKMAN, STIPULATOR,
APPELLANTS

VS.

MARY L. BRINDLE, AS EXECUTRIX OF THE ESTATE OF ALEXANDER BRINDLE, DECEASED,
APPELLEE

APPELLANTS' BRIEF

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The libel was filed in the District Court of Alaska at Ketchikan by Alexander Brindle, owner of the gas boat "Wildwood," against the gas boat "Eagle" to recover damages resulting from a collision between the two vessels on the evening of July 23,

1921, in Revillagigedo Channel off Mary Island Light, Alaska. Before final decree Alexander Brindle died and his widow was substituted as libellant.

The libel charged that the collision was caused solely and wholly by the fault and negligence of the "Eagle's" master and crew. Appellants in their answer alleged that the "Wildwood" was wholly to blame but after the proof had been submitted abandoned this contention and sought to establish mutual fault. The cause was heard upon oral evidence. There were two depositions touching loss of profits which are not necessary to a determination of this appeal, appellants having filed a statement with the clerk under subdivision eight of rule twenty-three designating parts of the record for printing purposes. See pages 300 to 306 of the apostles.

The district court found the "Eagle" wholly at fault and awarded damages to appellee as follows: (a) $1050.00 for repairs to the hull, (b) $294.30 cargo loss, (c) $222.50 batteries and equipment, (d) $200.00 reconditioning engine, (e) $240.00 loss of future profits the equivalent of demurrage, making a total award of $2,006.80.

In appellants' designation the clerk was directed to print only the parts pertaining to the questions of navigation and the division of damages upon the ground of mutual fault, expressly deleting those portions pertaining to the amount or allowance of damages. Appellee, however, designated certain additional parts touching a part of the damage award,—see page 307 of the record and a further designation at page 310.

Apparently it is appellee's intention to limit the discussion of damages to the one item of repairs to the hull, viz: (a) $1050.00. The language of appellee's designation at page 309 of the record is:

"This designation is * * * made because we desire to contend for an increased allowance for repairs to the hull and also for interest on all allowances made besides contending that all the damage shall be borne by appellant (claimant)."

In addition to the parts of the record deleted by our respective designations to the clerk, proctors for each of the parties stipulated that certain immaterial matter should be deleted and omitted from the printed record—see page 297 of the record, viz:

"In stipulating that the above parts of the record need not be printed, it is agreed that none of the foregoing parts are material or necessary for the

consideration of any question that is before the court. The parties hereby agree to and do accept the findings of the district court upon the following items only of the damage as assessed by the lower court, viz, $294.30 cargo loss, $222.50 supplies and material."

The items of $200.00 for the engine and $240 for loss of profits however have been eliminated by the respective record designations.

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STATEMENT OF THE CASE

The "Wildwood" is a gas boat of thirteen tons net, forty-five feet overall which was built in the year 1906. At the time of the collision she was being operated by two boys, one of whom was the son of the owner. The other Leo F. Ryan by name, was acting as master although he was not then twenty years of age. These two made the entire crew. On the 23rd of July, 1921, the "Wildwood" came into collision with the "Eagle" off Mary Island in Revillagegido Channel. The testimony is conflicting as to the distance the vessels were from the island when the collision occurred. Mr. Selig testified that the vessels came together about a mile

off the island. (Selig 239.) Ryan, master of the "Wildwood," made a statement in his collision report to the customs at Ketchikan that the collision occurred one mile off Mary Island light. (Ryan 153.) The distance off Mary Island is only important in determining the weight to be given to the testimony of the lightkeeper, Kinyon and wife. The "Wildwood" was southbound from Ketchikan, Alaska, to Prince Rupert, B. C., laden with fresh fish, the cargo consisting of several varieties of salmon.

The "Eagle" is a gas boat of twenty-seven net tons, sixty-three feet long. She was owned and operated by Steve Selig, as master. At the time of the collision she was enroute from Prince Rupert, light, bound north ~~from~~ to Ketchikan. Captain Selig had two men with him, Ames and Olander. These men were in the pilot house of the "Eagle" for some time before the vessels collided. Ames was steering and Olander was keeping lookout. Captain Selig left the pilot house and went below a short time before they came together.

The collision occurred a little south of Mary Island light. The vessels approached each other at about seven miles per hour upon meeting head on courses, the "Wildwood" travelling about southeast,

while the "Eagle" was proceeding toward Ketchikan on a northwest course. These courses are approximate.

The "Eagle" struck the "Wildwood" on the port quarter five or six feet from the stern, tearing through several planks and otherwise inflicting such injuries that she would have sunk, but for the aid and timely assistance of Captain Selig and his men.

It happened about twenty minutes after ten during fine weather in the summer time upon a clear moon-light night. The sea was calm and smooth. The moon rose in the northeast, coming up from behind the mountains on the mainland across the channel. It was nearly a full moon and was probably twenty degrees above the horizon at the time the vessels came together. The "Eagle" would have the moon on her starboard hand about abeam.

She was heading toward Point Alava, which is at the southerly end of Revillagegido Island, and about five miles north of the place of collision. The southern part of the island at Point Alava and the mainland opposite Mary Island are high and mountainous. The channel is about four miles wide. These high lands in the east and north, when the

sea is calm, present a dark background to vessels travelling northward, according to Captain Selig. The light-keeper's wife denied this, but the government chart in evidence shows the location and height of the mountains. Our general knowledge of light and shadows lends weight to Captain Selig's contention on this point. He testified that heading toward Point Alava the high lands in the east and north and the calm sea blended together in a dark mass, making it impossible to distinguish any object on the water against the black background.

The moon cast its rays westerly across the channel and lighted up the waters to the eastward and southward. There is a wide stretch of open sea south of Mary Island, where the channel widens out and reaches into the great open bay or arm of the ocean, called "Dixon's Entrance." To persons looking southward from Mary Island, these open waters extend as far as the eye can see. No land lies to the southward and southeastward except at a great distance, and there is no dark background of high land. The light-keeper and his wife readily saw the "Eagle" out in the channel to the southward in the "sheen" of the moon, while Ames at the "Eagle's" wheel did not see the oncoming "Wild-

wood" until she was about sixty feet distant. The appellants' failure to see the "Wildwood" is explained by the "Eagle's" crew, who say the "Wildwood" was travelling southward without lights. That the "Wildwood" saw the "Eagle" some distance away appears from the allegations of the libel, viz: part of the third article:

"When at the point above described the master of the 'Wildwood' observed a dark object off the port bow some distance away. The said object at first was taken for either a log or a shadow. As the object approached, and when about some sixty feet distant, it was discovered that it was a boat, and afterwards ascertained to be the gas power boat 'Eagle'."

The boy, Ryan, in charge of the "Wildwood" testified in answer to a question whether he could see the "Eagle" some distance away, that:

"If I had been looking over my port bow and watching closely, I might have seen it."

The light-keeper and wife saw the "Eagle" as she was travelling northward, at least four minutes before the "Eagle" flashed her lights on. During this time the "Eagle" travelled at least a half mile upon her course northward and the "Wildwood" travelled about the same distance southward. The

proof supported by the physical facts clearly shows that the "Eagle" stood out in bas-relief in the moonlight against the open horizon directly in the course of the "Wildwood" about dead ahead or slightly on her port bow, and could have been readily seen and avoided by the crew of the "Wildwood" if they had been attending to their duties. The proof further shows that Harold Brindle of the "Wildwood's" crew, at the time of the collision and for a long time before was below decks in his berth. That Ryan, master of the "Wildwood" was the only person on deck for a long time before the vessels collided. That he was doing double duty, serving as wheelsman and lookout at the same time. That a short time before the collision occurred, while the vessels were in the danger zone approaching each other, he (Ryan, master) left the wheel house, leaving the wheel without anyone to guide or hold it, and leaving the wheel house without lookout or pilot, stepped out on deck, went to the companion-way and stepped down below and talked with Brindle who was in his bunk about what course he, Ryan, (master and pilot) should take from Mary Island light, the "Wildwood" being then abreast of the light. It further appears that the "Wildwood" gave no signal of her approach. In view of the

allegations of the libel and the admissions of Ryan, master of the "Wildwood," we deem it proper in the opening statement to call attention to the obvious failure of the "Wildwood" to properly navigate and observe the rules of the road while in a position of danger from collision.

The "Wildwood's" crew contend they are without fault and that the collision was caused solely by the "Eagle," who ran her down while travelling north without lights. The claimants contend that the "Wildwood" was not observable against the dark background, that she was without adequate or sufficient lights, and that the "Wildwood's" light was not seen until she was about sixty feet from the "Eagle." When the vessels collided, Captain Selig rushed on deck and with help from Brindle and Ryan put lines on the "Wildwood" to keep her from sinking. After they had lashed her safely to the "Eagle," the latter towed the "Wildwood" to Ketchikan, where she was beached. Here the "Wildwood" remained indefinitely notwithstanding the claim of the libellant that she was a very valuable vessel, and was earning large dividends. As the only question pertaining to the damage award is confined to repairs, it will not be necessary to consider the loss of the "Wildwood's" earnings during

the period she would have been out of commission undergoing repairs. She was not repaired, but on the contrary was allowed to lie on her bilge on the tide-flats where she remained until and during the trial in the district court. As the repairs were never made, it was entirely a matter of estimating the cost of repair by expert builders. There was overwhelming evidence that she she was not worth repairing, the cost of repairs being greater than the value of the vessel. The "Eagle" was uninjured. No question is raised as to loss of cargo, supplies, batteries, profits, etc. This appeal presents the question of sole or mutual fault, and the allowance of $1050.00 for repairs to the hull. We understand appellee will ask for an interest allowance.

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SPECIFICATIONS OF ERROR

The error lay in finding the "Eagle" solely at fault. The proof shows a clear case of mutual fault. The assignments in one form or another raise the question whether the trial court was justified in placing the sole responsibility for the collision upon the "Eagle." See apostles, pages 287 to 292, inclusive—assignments one to twenty-seven.

ARGUMENT

The Comparative Fault of the Colliding Vessels

Before discussing the conduct of the two boys in charge of the "Wildwood" we have this to say of the master and crew of the "Eagle," viz: that of the two vessels the crew of the "Eagle" were in our judgment less culpable than that of the "Wildwood." Let us compare their several acts of omission and commission.

First, respecting the lookouts. Each vessel was at fault in not having a man on lookout stationed in the bow of the vessel. Of the two, the "Eagle" is in a better position. She had the benefit of two men in the pilot house. This cannot be controverted. The "Wildwood" had one man, viz: Leo F. Ryan, a boy not then twenty years of age. Ryan had a very limited experience. Al. Ames of the "Eagle" had three or four years' experience in gas boats and not three or four days' as said by the court in the opinion. For the court's statement in the opinion, see page 26 and Ames' statement under oath at page 207:

"Q. What has been your experience as a boatman, gas boat man, before the night of the collision?

"A. Oh, I worked on a few different boats.

"Q. How long approximately?

"A. Oh, I guess probably *three or four years* all put together."

The "Wildwood" was in the exclusive control and management of a young, inexperienced boy. Alone in the pilot house for at least an hour before the collision, he did double service, acting as lookout and steering at the same time. In addition to this glaring fault, viz: the failure to have a lookout other than himself, which in view of what happened was a very strong contributing cause, this young lad left the pilot house a very short time before the vessels came together, and crossing the deck went below leaving the pilot house and deck without anyone in command while the two vessels were entering the danger zone. See the statement of Harold Brindle, pages 124, 128, and particularly at page 129, as follows:

"Q. (To Brindle) You don't know as a matter of fact what course you were actually steering do you?

"A. Well, I know when he came down, I got out of my bunk and looked over and I could see just where it was."

Mr. Cosgrove at page 138 said to Ryan:

"Q. Just go ahead and tell what happened.

"A. Well, about six or seven minutes before we got to Mary Island light, *I went down* and hollered to Harold—he asked me to call him when we got to Mary Island—and I also asked him the course from Mary Island to Tree Point. He was down there where he had a light handy, and I didn't want to light the light in the pilot-house to look it up in the little log book. He gave me the course and I went back and put her on the course he give me and was holding her on that course, when all of a sudden I thought I seen a shadow ahead and just then the lights of a boat flashed on, headed straight at me on the port bow. I seen the head-light and the two side lights of the boat. I seen them all at the same time."

And again at page 275, Ryan when questioned by the writer, answered as follows:

"Q. But to communicate with anyone below as you did with Mr. Brindle on the night in question, it was necessary for you to leave the pilot-house and go down to speak to him?

"A. Yes, sir.

"Q. And you did that?

"A. Yes.

"Q. Was there anyone in the pilot-house during the time that you were off from the pilot-house speaking to Mr. Brindle?

"A. There was not.

"Q. You and Mr. Brindle were the only men on board?

"A. Yes.

"Q. (By MR. COSGROVE) How long did that take you?

"A. It didn't take me more than about twenty or thirty seconds."

Ryan admitted that if he had been keeping a careful lookout he would quite likely have seen the "Eagle." See the following by Mr. Martin on cross-examination (pp. 146, 147):

"A. (By RYAN) It was nearly a full moon.

"Q. Was it a clear night?

"A. It was a clear night.

"Q. Sea was calm?

"A. The sea was calm.

"Q. And nearly a full moon. If you had been alert and had been looking, you would have seen the hull of the 'Wildwood,' or rather the hull of the 'Eagle' some distance away, wouldn't you, a half a mile away or a mile?

"A. I don't know as I would, because when I was looking out at night I expected to see lights, if there was a boat in the distance.

"Q. Yes, but with a moon, now, nearly full and half way up on the horizon, clear night, not obscured, you could see the outline of the 'Eagle' on the water some distance away, couldn't you?

"A. *If I had been looking over my port bow and watching closely I might have seen it.*"

The Physical Facts Tend to Establish the "Wildwood's" Fault

The physical facts demonstrate quite conclusively the gross carelessness of this young man Ryan, and the testimony of the light-keeper and wife establishes beyond peradventure the fault of the "Wildwood." Upon a calm moonlight night the horizon line where sea meets sky is very clear. It presents a light, silver colored background upon which passing ships stand out in bas-relief with conspicuous clarity. This presents a familiar picture to one looking seaward on a bright moonlight night. Passing ships are so clearly visible upon the horizon under the moon's rays that it is difficult for one to see the ship's lights, the dark hull appearing so

vividly in the moonlight as to overshadow and destroy the artificial light rays. This was the condition of sea and sky looking southward from the place opposite Mary Island light where the "Wildwood" is known to have been during the few minutes before the collision.

There were no highlands in the south and east. There was a wide expanse of open water. The chart introduced in evidence proves this statement. The "Wildwood" heading southeast had a clear unobstructed view of this moonlit horizon and surface of the waters. What the light-keeper and wife saw casually from a less favorable viewpoint, the pilot and master of the "Wildwood" should have seen, bearing in mind by way of contrast that the light-keeper and wife were not particularly interested in the approach of the "Eagle," while the pilot and master of the "Wildwood" serving in the double capacity of wheelsman and lookout was especially charged under the law and in the special circumstances with maintaining an unusually vigilant lookout. Captain Ryan could have seen the approaching "Eagle" for at least five minutes before the vessels collided. The light-keeper and wife heard the "Eagle's" exhaust and Mr. Kinyon picked

her up with his glass. His wife saw the 'Eagle" as a moving object upon the waters before the lights were turned on. (See Apostles, page 100):

"A. Yes, I could discern an object barely with my naked eye, a dark object.

"Q. Even before you saw the lights turned on?

"A. Yes.

"Q. You just saw a dark object?

"A. I could see this dark object moving.

"Q. Then you watched them come together?

"A. Yes."

Mr. and Mrs. Kinyon contend that the collision took place about 700 feet from Mary Island. (p. 121.) Ryan at the trial said it occurred between 500 and 1000 feet off Mary Island, although in his collision report to the customs he said it took place a mile off the light. (See page 153.) Mr. Kinyon, light-keeper, fixes the distance at from 500 to 800 feet. (See page 116.)

If Mrs. Kinyon could see the "Eagle" from her place of observation on shore, as a dark moving object out on the waters before her with her naked eye before the "Eagle's" lights were flashed on, how much more readily and easily Ryan could have seen

the "Eagle" from his near-by and rapidly approaching "Wildwood," if he had been keeping a vigilant lookout—in fact one might say—if he had been looking at all.

Ryan not only kept no lookout himself, but he had no one else to perform this service. He was away from the wheel and pilot-house for some time, during which the "Wildwood" was running wild without a directing hand. Ryan says he was not away more than thirty seconds. This at best was mere guesswork. It is more probable that this irresponsible, inexperienced youth spent a minute or more below decks in finding out his course from Brindle. By his own estimate of thirty seconds, his vessel would travel three hundred and thirty feet.

He saw the "Eagle" when she was from 100 to 125 feet away, and yet gave no whistle blast, notwithstanding he observed her coming head-on. The fact that he saw all three lights—her red and green side-lights, and her mast head light, furnishes a complete refutation to any contention that the "Eagle" was a vessel crossing ahead when her lights were flashed on. Meeting in this situation he was obligated under the collision rules to give one whistle blast. It is this conduct on the part of the

"Wildwood's" master, which we say is grossly negligent in comparison with what was done on board the "Eagle," assuming that her master and crew were not free from fault.

We, therefore, say with some confidence that the trial court was clearly wrong in condemning the "Eagle" with such severity in view of the much more serious neglect and grave violation of all rules of navigation by the two nineteen-year-old boys in command of the "Wildwood."

The "Eagle" Was Not a Crossing Vessel

They were meeting vessels under article 18 of the "Inland Rules"—i. e., vessels meeting end on or nearly so.

The master and crew of the "Eagle," according to the light-keeper and wife, did not turn on the "Eagle's" lights, until the vessels were within a very short distance of each other. They say two seconds in time, but this is, of course, only guesswork. They could not see the distance between the vessels because of darkness and the elapsed time from the moment Mrs. Kinyon observed the dark

object, to the turning on of the lights and the impact of collision, must, of course, rest entirely on conjecture. Mrs. Kinyon did not see the mast-head and both side lights of the "Eagle," until the impact occurred. Note the following testimony by Mrs. Kinyon (page 109):

"Q. (By Mr. Cosgrove): Could you see those lights at the time she struck?

"A. I could at the time she struck."

And again at page 116:

"Q. You observed three lights?

"A. Yes. Not at the instant she flashed them on, but two seconds after, I observed them.

"Q. Two seconds after?

"A. Yes.

"Q. What light did you see when she first came up?

"A. The side light and masthead light.

"Q. Yes, what was the color of the side light?

"A. Red light. (p. 117.)

"Q. When they were flashed on do you recall that you saw all three?

"A. Not at the moment that they were flashed on—I wouldn't be certain. But at the moment of the collision, I saw all three lights." (Apostles, p. 122.)

Mrs. Kinyon saw the "Eagle" heading on her course as a shore observer on her port side. She saw the "Eagle's" red light. The "Eagle" was pursuing a course nearly parallel with the island. She would not have exposed her green light on this course to a shore observer off on her port side. She could not have done so, unless she had changed her course four or five compass points to port. Mrs. Kinyon admits she did not see the "Eagle's" three lights until the impact took place. This is entirely consistent with Ryan's statement that he first saw all three lights of the "Eagle." Note his testimony, Apostles, page 138:

"Q. (Direct examination by Mr. Cosgrove): Just go ahead and tell what happened.

"A. * * * he gave me the course and I went back and put her on the course he give me, and was holding her on that course, when all of a sudden I thought I seen a shadow ahead and just then the lights of a boat flashed on headed straight at me on the port bow. *I seen the headlight and the two side lights of the boat. I seen them all at the same time*, and I promptly swung the helm to port which put the boat to starboard, and she rammed us right there."

On cross-examination Ryan testified (p. 149):

"A. I would say, then, port quarter on the bow.

It was about six feet back from the bow on the port side, right over there and I seen her.

"Q. Where did she hit?

"A. She hit eight feet from the stern.

"Q. Yes—but now, keeping in mind the line of your keel—

"THE COURT (interrupting): He answered that question by saying it was about six feet from the stem of the boat on the port bow, that is when he first saw her.

"MR. MARTIN: That, your honor, would not be very definite—six feet.

"Q. Do you mean at an angle, or measured about six feet right at the bow of your vessel?

"A. Well, looking from the middle of the boat, straight above the keel looking at the front window it would be about six feet from the stem on the port side."

And at page 150 of Apostles—cross-examination of Ryan continued:

"Q. When the lights were flashed on, you saw all three lights—you say?

"A. Three lights on the gas boat 'Eagle.'

"Q. That is, you saw the green light and the red light and the white masthead light, white masthead light?

"A. Yes, the white masthead light."

From these statements it is clear the the "Eagle" was running northwesterly up the channel on a course, which would take her well clear of Mary Island light—or upon a course nearly parallel with the island. In this position Mrs. Kinyon would naturally see the port-light of the "Eagle," and Ryan, looking ahead, would see in front of him all three lights of the "Eagle." If she had been pursuing any other course, her lights would not have shown in the manner indicated by these two witnesses. If the "Eagle" had been any distance on the "Wildwood's" port bow, heading directly toward him, Mrs. Kinyon would have observed both side lights and the masthead light of the "Eagle." The trial court was clearly wrong in holding that the "Eagle" was a crossing vessel under the starboard hand rule, and that by reason of this position the "Wildwood" had the right of way. If she was holding a course which would make her a crossing vessel, the 'Eagle" would have exposed both side lights to the light-keeper and wife. She would have been heading directly for the island toward them head-on, thereby crossing the "Wildwood's" course, which lay parallel to the island—the general trend of the island shore being northwesterly and south-

easterly. Mrs. Kinyon is careful to say she saw only the "Eagle's" red light until the collision occurred, at which time she saw both of her side lights.

Again if the "Eagle" had been a crossing vessel, showing both side lights, she must have been coming toward the "Wildwood" at right angles, and far enough aft on the "Wildwood" to strike her amidships, if the "Wildwood" had stopped suddenly. In this position with 125 feet clearance, collision was not possible. In no other position would the "Eagle" show both side-lights, unless she was nearly in line meeting end on. In any position on an angle between the "Wildwood's" bow and beam on the port side, where there was danger of collision, the "Eagle" would present only her green light to the view of a person on the "Wildwood's" deck. If she were on the "Wildwood's" port bow to any extent and in a crossing position involving danger of collision she would not have exposed both side lights. In this position as a crossing vessel burdened under the right of way rule, she would have exposed both side lights to Mrs. Kinyon, and only her green light to Ryan. Whereas the witnesses give the opposite version, viz: Ryan saw all three lights, while Mrs. Kinyon saw only the masthead and red side light.

The natural position and course of the "Eagle" verify these statements, for the "Eagle" had no occasion to steer any course other than one northwesterly parallel with the island. This testimony of Leo Ryan and Mrs. Kinyon establishes the position of the "Eagle" the moment the lights were flashed on, whatever the distance between the vessels may have been. In other words this testimony shows clearly that the vessels were meeting end on, and that the "Eagle" was not a crossing vessel.

Mrs. Kinyon's statement that she saw both side lights of the "Eagle," when the collision occurred does change the situation. It is explained by what was done by the vessel just before they came together. Ryan ported his helm and swung to starboard,—Ames on the "Eagle" reversed his engines and ported his helm. Whether he ported or not is immaterial in considering this matter of lights. The "Eagle's" engines in reverse had about stopped her progress through the water. This cannot be denied for if she had been going ahead full speed she would have cut the "Wildwood" in two. Captain Selig and Al. Ames both testify to reversing the "Eagle's" engines and the blow struck corroborates them. With the "Eagle" nearly stopped and still

reversing, the "Wildwood" going ahead at her regular speed of seven miles per hour under full port helm, would naturally swing the "Eagle" around with her. This would turn the "Eagle's" prow toward the land. When the "Eagle" commenced to gather sternway under port helm she would swing still more rapidly toward the land. The "Eagle" in reverse under port helm would tend to increase the swinging movement which the "Wildwood" set in motion when the vessels met. Nor can we be sure that the Kinyons saw the "Eagle's" side lights. They may have seen the "Wildwood's" lights, for the latter also turned rapidly to starboard toward the land. This, however, does not affect the position of the vessels before the collision as indicated by the lights of the "Eagle," as observed by the Kinyons and by Ryan.

The "Wildwood" Did Not Have the Right of Way

The trial court is in error when it holds in the opinion that:

"The right of way was with the 'Wildwood.' The approaching vessel was off the port bow apparently head-on." (Pages 31 and 32 Apostles.)

The position of the vessels, as indicated by the witnesses, shows they were meeting end on or nearly so, when they were first observed by each other, and by the shore witnesses. The position of the blow and its direction ranging wedge fashion from forward aft show that they nearly cleared each other. This proposition clearly undersood, viz: that these vessels were meeting end on, it follows that the "Wildwood" should have given one blast of her whistle. This she failed to do. (See page 272.) And this is important, because of what the trial court found as to what was done by the "Eagle," when the "Wildwood" was first observed, viz: see the opinion, Apostles 30 and 31:

"I am, therefore, satisfied from the testimony that the 'Eagle' did not port her helm and turn to starboard as testified by Ames, but that she either kept on her course, or turned to port or inshore toward Mary Island as testified to by Ryan and by Mr. and Mrs. Kinyon. If the 'Eagle' had turned to starboard, she would have cleared the 'Wildwood,' or at least have struck her only a glancing blow. * * * I can, therefore, come to no other conclusion than that the proximate cause of the collision was the negligence of the 'Eagle,' first in travelling after nighftall without lights, and second in not turning to starboard on discovery of the 'Wildwood'."

The "Wildwood's" Failure to Whistle

In view of this finding, the necessity for giving one blast of the "Wildwood's" whistle is apparent. If the libellant's contention that the "Eagle" starboarded and cut into the "Wildwood" is true, and the court so found, then the failure to give one whistle blast is vital to the case. Can an admiralty court say that when vessels meet end on or nearly so and one of them fails to give one blast of her whistle, as required by article 18 of the Inland Rules, that she can be considered free of fault, when if she had given one blast, she might have aided the other vessel in determining what to do?

According to Al. Ames of the "Eagle," he saw a single dim white light. He saw no side lights at all. In this situation a blast from her whistle would have announced a port to port passing. Ames, of course, claims he ported his helm and swung to starboard. If he did so, then he was not guilty of one of the acts of omission which the court found caused the collision. If he did not port his helm, but kept a straight course or starboarded, swinging to the left into direct contact with the "Wildwood,"

then the "Wildwood" cannot complain for she failed to sound the warning intended for just such situations. And the court cannot say that the failure to sound the whistle was an act in extremis. You cannot estimate distance well at night, but assuming that the vessels were 125 feet away and travelling toward each other at about eleven feet per second, which would be their rate of speed at about seven miles per hour, there would be sufficient time to pull a bell-cord on the "Wildwood." The court's erroneous finding rests largely upon the theory that the "Eagle" was a crossing vessel burdened with the "Wildwood's" right of way, and that the "Wildwood" was not obligated to blow her whistle. Ryan saw the dark outline of the "Eagle" some distance away before the vessels got to within 125 feet of each other, and yet gave no signal.

The Further Negligence of the "Wildwood"—The Age and Inexperience of the Master

Leo F. Ryan, master of the "Wildwood," was not yet twenty years old. He was grossly incompetent. In fact Harold Brindle from his position below decks appears to have given Ryan the necessary

instructions as to course and distance. His experience was limited. He gave the following testimony:

"Q. What has been your experience with gas boats?

"A. Well, I worked around for J. L. Smiley at Charcoal Point and I worked on other boats, a day or two here and a day or two there. I worked on the 'Wildwood' previous two months, and I was on several small gas boats."

He testified that he took out a master's certificate for the "Wildwood" in February, 1921; that he had never been master of any other vessel. He was asked:

"Q. How long had you served on gas boats before going on as master of the 'Wildwood'?

"A. Probably six months on different boats.

"Q. Boats as large as the 'Wildwood'?

"A. Smaller boats than the 'Wildwood'."

He had served on little boats 32 or 33 feet long. He had no experience on large gas boats and he joined the "Wildwood" twelve dayes before the collision occurred. (See his cross-examination, pages 141 and 142.)

This vessel was registered under the laws of the United States. Her master was required to be a citizen of the United States and a person twenty-one years of age. See Treasury Decisions No. 5087 and also the earlier decision No. 3814.)

The rule of law is that if a master or other officer is not a citizen or not of age or not licensed, the ship will be held at fault if the master's lack of experience generally or lack of skill or judgement in the particular case could have possibly contributed to it. In the City of Baltimore, 275 Fed. 490, the court holds that an unlicensed master in charge of a vessel "in flat defiance of the law" (requiring licensed officer) is a fault which is chargeable to a vessel in a collision case and renders her liable.

In the instant case the treasury decisions *supra* hold, following the requirements of the navigation laws, that a vessel of American register or enrollment of five tons or more shall be owned by an American citizen and that her master shall be an American citizen. In construing this statute the attorney general and the department hold that a master of a vessel must be twenty-one years old as a male person does not become a citizen until reaching that age so as to have the right to command an

American vessel. Lack of skill and experience dictate such a conclusion.

One has but to enquire at any of the United States Customs to learn that they will not permit a person under twenty-one years to act as a master of a registered or enrolled vessel of the United States. Their uniform practice in this particular is based on the treasury decisions quoted.

An inexperienced boy, not then twenty years of age was in command of the "Wildwood." His inexperience clearly contributed to the collision for he kept no lookout, left the pilot house at a crucial moment, left his vessel to steer herself, gave no signal, failed to stop, failed to reverse, etc., when he saw the dark object on his port bow.

The Failure of the "Wildwood" to Keep a Lookout

The "Wildwood's" fault clearly appears from the libel. The Wildwood's master "observed a dark object off the part bow some distance away."

Article XXIX of the Inland Collision Rules is as follows:

"Nothing in these rules shall exonerate any vessel or the owner or master or crew thereof, from the

consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

The master of the "Wildwood" was charged under the rules to avoid coming in contact with this dark object observed on the "Wildwood's" port bow. It is said that it was observed some distance away; that it was first thought to be a log or a shadow. The law required the master of the "Wildwood" at that moment to use his night or other marine glasses to ascertain definitely what this object was. If he was still in doubt as to what the dark object was, not seeing any lights or hearing any signal, it was his duty to give a danger signal of four whistle blasts and to stop and reverse his engines. It was his duty under rule XXIX above cited to take such precautions in the circumstances disclosed to him as would avoid peril and probable collision. If it is claimed that he could not see which direction or course the dark object on his port bow was taking it was at least apparent to him that the object was coming toward him and that his vessel was approaching this object. Mrs. Kinyon saw the dark object afterward ascertained to be the "Eagle,"

with her naked eye from her place on shore much farther away than Ryan. It was in these circumstances his duty to stop and give the danger signal or take such other steps by changing his course as would have avoided the collision which followed. Instead, there is no allegation that these things were done, but on the contrary the proof shows clearly that the "Wildwood" continued her course and speed with this dark object rapidly approaching. Her master then states that it was observed to be a gas boat; that the lights on this boat were flashed on when she was one hundred twenty-five feet distant. It is clear that the master of the "Wildwood" was negligent in failing to take the steps which proper navigation required in a situation of that sort.

Captain Ryan was alone in the pilot house for some minutes before the collision occurred, during which time *he was engaged in steering* the "Wildwood," looking at the compass and keeping the vessel upon her course. During the few minutes before the collision the vessels were coming together upon a course which would bring them in collision almost head-on. He saw the outline of the "Eagle" before her lights were turned on. *He said that if he had been paying attention he could have seen the "Eagle" some distance away.* (See

147.) It was a clear moonlight night. The "Eagle" was in the "sheen" of the moon ahead of him. He could have seen her if he had looked in ample time to have changed his course and avoided the collision. He left the pilot-house and was paying no attention whatever to the navigation of the vessel just at a time when if he had been keeping a careful lookout he would have seen the approaching "Eagle." The "Wildwood" during a brief period was without helmsman or lookout. He gave no danger signal when he first observed the dark object some distance away on his port bow nor did he change his course to avoid it. He failed to give any signal although he saw the outline of the "Eagle" before she turned on her lights, but did nothing notwithstanding his expressed doubt as to the "Eagle's" course or intentions. When from 100 to 125 feet away the "Eagle's" lights were turned on according to his version, yet he did nothing to prevent collision either by blowing the danger signal or stopping and reversing.

From the master's testimony the "Wildwood" was clearly at fault in:

1. Not keeping a lookout.

2. Not stopping, backing and giving the danger signal when he was in doubt about the dark object on the port bow.

3. Not giving one blast of his whistle if he intended to make a port to port passing when he saw the masthead and side lights of the "Eagle" bearing about six feet from his stem on his port bow.

4. In leaving the pilot-house for a number of seconds during which time his vessel was without lookout or helmsman, and was moving forward throughout the water at ten or eleven feet per second toward the "Eagle" upon head on courses.

The Legal Effect of Failure to Keep a Lookout

Small gas boats are not exempted from the operation of the collision rules. This question was recently decided by this court in the case of Mylroie v. British Columbia Mills Tug and Barge Company, 268 Fed. 449 at 455. It was contended that there was a custom for small tugs not to maintain any lookout stationed forward. The captain and pilot were in the pilot-house and stated that they

were keeping lookout. There was also a man in the pilot-house engaged in steering the vessel. This court said:

"But, regardless of the question of the preponderance of evidence on the point, we think it clear that custom counts for nothing as against the law. See authorities *supra*, and The Catharine v. Dickinson et al., 17 How. 170, 177 (15 L. Ed. 233), where the supreme court, referring to the evidence given to prove such a custom, said:

" 'However, this may be in the daytime, we think that such custom or usage cannot be permitted as an excuse for dispensing with a proper lookout while navigating in the night, especially on waters frequented by other vessels. Under such circumstances, a competent lookout, stationed upon a quarter of the vessel affording the best opportunity to see at a distance those meeting her, is indispensable to safe navigation, and the neglect is chargeable as a fault in the navigation.'

"But even if it be conceded that a man stationed in the pilot house of the tug, charged with the duty of keeping a lookout, would answer the requirements, the evidence in the case clearly shows, in our opinion, that neither of the men in the pilot house of this tug during the time in question constituted such a lookout; for one of the men was the helmsman, whose duty it was to watch the compass and steer the vessel under orders given him, and the other two were Capts. Johnson and Bjerre, who,

when both were present, were part of the time examining the chart and engaged in conversation; it further appearing that at the time the dangerous situation was discovered and for a considerable period immediately preceding, Capt. Johnson was not in the pilot house, but in some other part of the vessel. It cannot be properly held that before Capt. Bjerre, who was at the time directing the movement of the tug, saw the waves breaking upon the island, and suddenly, without any warning to the tow, ordered the wheel put hard over, thereby breaking the tow's shackle, and resulting in its being grounded, a lookout properly stationed would not have seen and reported the island ahead in ample time to have afforded the tug an opportunity to make a safe turn with the tow following."

This rule was approved in The Tillicum, 217 Fed. 976 at 978, decided by Judge Neterer in 1914. It was a case where a lookout was not maintained. She was a tug 87 feet long. It was contended that by custom, lookout in the pilot house was sufficient.

"It is immaterial what the custom in the operation of boats is if the custom is contrary to the law. If a custom could obtain over the law, navigators could very readily overcome an act of congress. * * * Such cannot be the law."

We have cited the general precaution rule, to-wit: article 29, for the reason that the failure to keep a lookout is one of the faults which this rule seeks

to guard against. That all moving vessels shall maintain a careful and efficient lookout is an elementary rule of navigation and good seamanship. Vessels are held to a strict performance of this duty.

This court, speaking through Judge Morrow, said in Wilder S. S. Co. v. Low, 112 Fed. 161:

"The officer in charge of the steamer Claudine at the time of the collision in question did not slacken her speed, stop, or reverse the engines when the uncertainty of the barkentine's identity and direction became apparent to him. In fact, his actions at that time, from his own testimony, reflect grave doubts upon his ability to command a steamer under such circumstances.

"For an officer to leave his vessel entirely without a lookout especially when another vessel is known to be in the vicinity, is culpable negligence, *and approaches very nearly the line of reckless navigation.* The importance of the lookout and the high degree of vigilance required of the person occupying that position on a vessel, is clearly stated by the United States Supreme Court in *The Ariadne*, 13 Wall. 475, 478, 20 L. Ed. 542, 543, as follows:

" 'The duty of the lookout is of the highest importance. Upon nothing else does the safety of those concerned so much depend. A moment's negligence on his part may involve the loss of his vessel, with all the property and the lives of all on board. The same consequence may ensue to the vessel with which

his shall collide. In the performance of this duty the law requires indefatigable care and sleepless vigilance. * * * It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. *Every doubt as to the performance of the duty, and the effect of nonperformance, should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary.*'

"No deviation from this statement has been made by the supreme court in later cases (The Oregon, 158 U. S. 186, 193, 39 L. Ed. 943), and it is therefore as binding today as when first made."

The courts say that the rule as to lookouts requires him to be placed near the bow of the ship, and that it isn't sufficient for a lookout to be maintained in the pilot-house. If a man had been stationed at the "Wildwood's" bow attending to his duties as lookout a collision would have been avoided.

Of lookouts properly stationed, the supreme court in The Ottawa, 3 Wall. 269, 272, says:

"They must be persons of suitable experience, properly stationed on the vessel, and actually and vigilantly employed in the performance of that duty. Proper lookouts are competent persons *other than the master and helmsman*, properly stationed for

that purpose, on the forward part of the vessel; and the pilot house in the night time, especially if it is very dark, and the view is obstructed, is not the proper place.

"Lookouts (says the supreme court) are valueless unless they are properly stationed, and vigilantly employed in the performance of their duty; and if they are not, and in consequence of their neglect the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel, and will render her liable, unless the other vessel was guilty of violating the rules of navigation."

The Colorado, 91 U. S. 692, 699.

To the same effect see also:

The Pilot Boy, 115 Fed. 873.
The Komuk, 125 Fed. 841.
The Violetta, 141 Fed. 690.
The Fannie Hayden, 137 Fed. 280.
The Tillicum, 217 Fed. 976.

The leading United States Supreme Court case is that of The Ariadne, 13 Wall. 475-479, 20 L. Ed. 542.

This case was approved in Argo S. S. Co. v. Buffalo S. S. Co., 223 Fed. 586, holding both vessels in fault for failure to keep a lookout; The Cypromene,

135 Fed 565, holding steamer navigating river at night without a lookout liable; The Sitka, 132 Fed. 864, holding steamer liable for collision with passing vessel where she had no efficient lookout.

The Failure to Give a Danger Signal if in Doubt and the Failure to Give the Meeting End on Signal Under Rule 19 Contributed to the Collision Which Followed

Ryan, master of the "Wildwood," says that when the "Eagle" flashed on her lights she was then in a line about six feet from his stem—that he saw in this position both side lights and masthead light of the "Eagle." In these circumstances she could not have been a crossing vessel. If, however, it is claimed that the "Eagle" was a crossing vessel, the failure to give one blast of the whistle under the pilot rules, and the failure to stop and blow the danger signal if the maneuvers of the "Eagle" were not understood, is likewise a clear fault on the part of the "Wildwood."

Article XVIII, Inland Rules—is as follows:

"If when steam vessels are approaching each other, either vessel fails to understand the course or

intention of the other, from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts not less than four of the steam-whistle."

This signal is commonly called the Danger Signal. The purpose of the signal is to notify or give warning to the approaching vessel that her course, and intention are not understood.

The rule (Danger Signal, Rule III, Art. 18, Inland Rules), requires that the signal shall be given, immediately doubt arises as to the course or intention of the approaching vessel.

The Acilia, 120 Fed. 455.

Straits of Dover, 120 Fed. 900.

The Straits of Dover being the privileged vessel as was the "Wildwood," if the court can possibly hold the "Eagle" to be a crossing vessel instead of a vessel meeting end on or nearly so, was held at fault for failure to sound the danger signal because it was or should have been apparent to her that the "Bluefields" was persisting in a wrong course involving danger of collision. See:

The Robert Dollar, 160 Fed. 876.

The Virginian, 238 Fed. 156.

The Admiral Watson, 266 Fed. 122.

That there was danger of collision whether the "Eagle" be regarded as a crossing vessel under rule 19 or a meeting end on vessel under rule 18 is apparent from the fact that the vessels collided. This fact establishes the danger of collision. As said by the supreme court in the case of The Carroll, 8 Wall. 302:

"The fact that the vessels did collide explodes the theory that there was no risk of collision."

If when the "Wildwood's" master first observed the "Eagle" as a log or shadow off on his port bow he could not tell which way it was moving or what it was, and if when he saw the outline of the "Eagle" in the darkness before her lights were turned on, he was in doubt he should have stopped his engines and have sounded the danger signal.

The Failure of "Wildwood" to Show a Range Light

The "Wildwood" was running without a range light. The light-keeper and his wife testified that they observed one white light on the "Wildwood" after she passed in front of their house. They say

this was her masthead light. By the Inland Rules and by the Motor Boat Law, motor boats of upwards of 40 feet (and the "Wildwood" was forty-five feet according to the testimony), must carry a range light visible all around the horizon. The light-keeper and his wife testified that they observed the white light of the "Wildwood" after they had lost her ~~red~~ green light. They are clearly mistaken in this because if they saw a masthead light on the "Wildwood" they must of necessity have lost it at the instant when they lost the ~~red~~ green light, for the masthead light and the ~~red~~ green side light are required to show from the bow around to two points abaft the beam on the port side of the vessel. When one disappeared the other must likewise have disappeared. If the light-keeper and his wife saw a white light after losing the ~~red~~ green, it was clearly the light of the "Eagle" and not that of the "Wildwood." It could not be the "Wildwood's" range light because they saw but one white light all the time that they observed the "Wildwood's" port light as she passed before them southbound. They speak of seeing but one light and clearly would have seen two lights if the "Wildwood" had been carrying a range light. This range light is singularly enough missing with a very apt explanation that it was lost; but the testimony dis-

closes that it was not burning—otherwise it would have been seen.

If the range light had been shown on the "Wildwood" it would have given the "Eagle" further aid in avoiding her. Captain Selig testified that the "Wildwood" had only one light. This was the masthead light, which he and Ames say was smoked up, and very dim.

The Titon, 23 Fed. 413.

The Fault of the "Eagle" Was Less in Comparison

We should have contended that it was the sole fault of the "Wildwood" but for the testimony of the lightkeeper and wife as to when the lights of the "Eagle" were flashed on. According to Mr. Selig, owner of the "Eagle," and her helmsman, the lights were flashed on when it commenced to get dark, some time before ten o'clock, and that these lights were lighted and burning for at least a half hour before the collision occurred. The testimony of the light-keeper and wife is that the "Eagle's" lights were flashed on a few seconds before the collision.

Possibly Capt. Selig turned the wrong switch when he went below at ten o'clock, and thought his lights were burning. If he is mistaken and was running without lights when there was danger of collision, he was at fault. This was not the sole or proximate cause of the collison by any means. The "Eagle" was in the "sheen of the moon" clearly observable some distance off on the port bow without lights. Captain Ryan saw her and was not misled by the failure to carry lights. Mrs. Kinyon saw her with her naked eye before the "Eagle's" lights were flashed on. His fault was as great even if the "Eagle" had never shown lights. Lights are primarily used to make visible that which would be otherwise invisible. That this failure on the part of appellants was not much of a factor in the situation is clear by Ryan's testimony, who says that he observed the "Eagle" at least 125 feet away; that he saw her before her lights were flashed on; and that if he had been paying attention he could have seen her for a much longer distance before her lights were turned on. In other words, the failure to maintain lights on the part of the "Eagle" had very little to do with the collision which followed. The "Eagle's" engines were reversed immediately when the masthead light of the "Wildwood" was

observed. Her helm was put hard aport and she immediately responded swinging to starboard. That she did the right thing is evidenced by the blow struck. The "Wildwood" did not stop, reverse or whistle, and she was without lookout in the danger zone.

The "Wildwood" Must Show That Her Violations of the Collision Rules COULD NOT Have Contributed to the Result Before She Can Escape Responsibility for Mutual Fault and a Divided Liability

These collision rules are found in an act of congress. Violation of a statute is negligence in itself. We see no reason why the reasoning of the court in the Pennsylvania (U. S. Supreme Court), 19 Wall. 125, 22 L. Ed. 148, should not apply. There the court said:

"The liability for damage is upon the ship or ships whose fault causes the injury; but when, as in this case a ship at the time of collision is in actual violation of a statutory rule intended to prevent collisions it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such a case

the burden rests upon the ship of showing not merely that her fault might not have been one of the causes, or that it probably was not, *but that it could not have been.*"

This rule applies where a proper lookout is not provided:

The Geo. W. Childs, 67 Fed. 272.
McCabe v. Old Dom. S. S. Co., 31 Fed. 234.
The Lyndhurst, 92 Fed. 681.
The Beaver, 197 Fed. 866.
The Welburt L. Smith, 217 Fed. 984.

The instant case is not unlike "The Manitoba," 122 U. S. 97, 30 L. Ed. 1095, where the court observed that:

"If the requisite precautions had been observed by both or by either of said vessels, the collision in the opinion of the court would not have happened."

The difference between "The Manitoba" case and that of "The Bluejacket," 144 U. S. 371, 36 L. Ed. 469, cited by the trial court to sustain its position denying mutual fault is readily noted at page 294. The case is clearly distinguished in our favor. "The Manitoba" ruling is clearly applicable to this case, while "The Bluejacket" decision is as clearly in-

applicable. The supreme court said in "The Bluejacket" case, *supra*, that:

"The difference between the case of *The Manitoba* and the present case involves the vital point, that, in the former, the question was between two steam vessels, while the latter, it is between a steam vessel and a sailing vessel. In the case of *The Manitoba*, the courses of the two steam vessels were not such as to make it the duty of the one more than of the other to avoid the other, or to make it the duty of the one rather than of the other to keep her course; and there was, in regard to the courses of both the steam vessels, such risk of collision that the obligation was upon both to slacken speed, or, if necessary, stop and reverse. But in the present case, the duty was wholly on the ship to keep her course, and wholly on the tug to keep out of the way of the ship; and there was no duty imposed on the tug to stop and reverse, until, as above shown, she was in the very jaws of the collision."

The Circuit Court of Appeals in the Southern District of New York said in Delaware L. & W. R. R. Co. v. Central R. Co., 238 Fed. 560:

"The fundamental rule of the admiralty is that a vigilant lookout must be kept on all vessels, so that collision may be prevented *even with those which are violating the rules.*"

This is emphasized by article 29 of the Inland Rules, applicable to this collision which provides:

"No vessel under any circumstances to neglect proper precautions.

"Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, *or of any neglect to keep a proper look-out*, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

"Who can say that this negligence on the part of the Roselle did not contribute to the collision? There is no obligation in navigation that this court is more disposed to enforce *than the duty of keeping a proper lookout.*"

We have underscored the phrase "the duty of keeping a proper lookout" in decisions quoted and in collision Rule 29 to add emphasis to this violation of duty and statute by the "Wildwood."

The Tillicum, 217 Fed. 976—Collision—decree against both vessels. Judge Neterer, in holding both vessels at fault quoted from the decision in "The Arthur M. Palmer," 115 Fed. 417:

"If tugs will go about the harbor without look-outs, they may not expect that the court will conjecture nicely what would have happened if the lookout had been in his place, doing his duty, when the collision occurred."

In "The Tillicum" case, Judge Neterer found both vessels at fault where the lookout was maintained in the pilot house.

The statement of the supreme court in "The Ariadne" should settle any doubts concerning the question of mutual fault. In speaking of the duty of maintaining a look-out, the supreme court said:

"It is the duty of all courts charged with the administration of this branch of our jurisprudence to give it the fullest effect whenever the circumstances are such as to call for its application. Every doubt as to the performance of the duty and the effect of nonperformance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."

The appellant is, in our judgment, clearly entitled to a division of damages because of the fault of the "Wildwood," which was fully as great if not greater than that of the "Eagle."

DAMAGES

We are in some doubt as to our position before this court upon the question of damages reserved for consideration by counsel for appellee. By our designation and statement of errors to the clerk, upon which we intend to rely in this court, pursuant to subdivision 8 of General Rule 23, the questions upon this appeal, are limited to matters pertaining to faulty navigation, all questions of damages being eliminated. We deem it proper to say at this point that, after carefully examining the rules, we came to the conclusion that rule 3 and section 3 of rule 4 of the Admiralty Rules for the Ninth Circuit upon appeal are not inconsistent, nor are they out of harmony with subdivision eight of General Rule 23 of this court, the underlying purpose apparently being to save expense and unnecessary labor on the part of court and counsel, where the parties can stipulate to narrow the scope of the appeal, or by designation and statement of errors, upon which they intend to rely, accomplish the same purpose. Where, however, the appel-

lee is not willing to accept this designation, the question naturally arises, is the appellant concluded by his designation from discussing all the questions remaining in the record in his opening brief, or may he with propriety discuss the damage question raised by appellee as a part of his case because of appellee's inclusion of matter, which would otherwise be left out, or should appellant wait until appellee states her position upon the matter contained in her designation?

We see no impropriety, however, in making a general statement of our position upon the question of damages specially reserved by the appellee, who will undoubtedly take the position that the damage award of $1050.00 for repairs upon the hull was inadequate and insufficient, in view of the testimony in the case, which he has caused to be printed under his designation. We should not have been content to accept this finding of the trial court, were it not for the fact that the amount in dispute did not in our opinion justify a presentation of the question, because of the expense of printing the record and briefs. The trial court awarded $200.00 for re-conditioning the engine. This item was accepted by appellant notwithstanding it appeared from the testimony that the "Wildwood"

could have been placed upon the marine ways at Ketchikan upon her arrival. If this had been done, her engine would not have needed re-conditioning at all. If, as claimed by appellee, the shaft was injured, it could have been taken out and straightened with small expense. Appellee, however, instead, permitted the "Wildwood" to remain on the beach in a position where the tide flowed in and out of the hull through the break in the side. The engine was taken down piece-meal and carried to an engine repair shop where it lay at the time of trial. It had not in fact been re-conditioned, the testimony upon re-conditioning being that it would cost $200.00 to restore the engine to its former good condition. There was no testimony showing what it would cost to straighten the shaft, and appellee was not properly entitled to an allowance of $200.00, or any other sum for the engine. Nevertheless we accepted this item of damage. This when added to the sum of $1050.00, gave the appellee a restored hull and engine. We likewise accepted the items allowed by the court for loss of supplies, cargo and demurrage, or loss of profits. The appellee, therefore, had in addition to her demurrage, cargo and equipment loss, an allowance

of $1250.00 for the hull and engine to restore the vessel to its former condition.

There was substantial testimony in the record that the "Wildwood" was not worth more than $1,000.00 fully equipped at the time of the collision. If this testimony is to be relied upon, the damage award leaves the appellee with her engine, together with $200.00 to restore it to its former condition and $1050.00 for repairs upon a hull, which is $50.00 in excess of what the engine, hull and entire boat equipment was worth. The boat was not worth the cost of repairing and no damages should have been allowed at all in excess of the value of the boat as she stood before the collision. The hull was not worth to exceed $300 or $400 at best. Note the testimnoy of the witnesses in this connection. Each one of the libellant's repair witnesses was forced to admit that the "Wildwood" was not worth repairing. The testimony shows that the "Wildwood" was built in 1906, that her hull was not worth to exceed between $400 or $500 before the collision. Alexander Brindle testified that he bought the "Wildwood" four years ago paying $350.00 for the hull. He did not show wherein he had improved the value

of the hull except to install the engine which cost him from $1500.00 to $1800.00, including the cost of installation.

Appellee saved her engine. The court has allowed her $200.00 to restore it to its former condition, which with our acceptance of the other items of loss, leaves only the item of repairs to the hull. In making this award the court has not only allowed more than the entire vessel was reasonably worth at the time of the collision, but has allowed a greater sum than the repairs were reasonably worth in view of all the testimony. The court in making this award has disregarded entirely the testimony of Keesling, Radenbaugh and Rasmussen, all of whom were independent contractors, who would have done the work for $600.00 or $700.00. If this work had been offered on bids or tenders, it would have gone to one of these men rather than to the highest bidder, Inman, or to the Slocum Shipyard Company. Admiralty courts always recognize competitive bidding. All things being equal the lowest bid would be accepted. There was nothing in the testimony, which would show that the bids of these three men at a much lower price should have been rejected, because of their inability to do the work in a workmanlike manner, or to get it out on time. If the

court had rejected this testimony, because these men could not do the work as well or within the time the two others could do it, we might not have cause to complain at the action of the court in fixing the cost of repairs upon the estimate of the two high men. We respectfully submit that a court is not at liberty to disregard testimony of this character in the absence of any showing that these three men could not restore the hull to as good condition as before the collision upon the price submitted. Any award in excess of $600 or $700 is excessive in view of this testimony, and was more than the hull was worth even at that figure.

The rule of law applicable to this situation is well stated in "Roscoe on Damages and Marine Collisions" second edition, page 52, as follows:

"When a vessel is so much damaged by a collision that a prudent uninsured owner would not repair her, such vessel must then be considered as a constructive total loss, and her owner is entitled to claim from the wrongdoer the value of the ship as if she had been actually and totally lost (see *ante*, p. 32). This rule is based on the principle of *restitutio in integrum* already fully discussed, because the loss of the value of a ship is the maximum loss which can result from a collision. It is also supported by the principle that the injured party must

minimize his loss so far as is reasonably possible. To take a simple example, if a ship which is only worth at the time of the collision £5000 is so much injured that the cost of repairs will be £6000, it would be obviously unjust to demand from the wrongdoer as damages a sum greater than that which would give the owner of the injured vessel the actual value of his ship at the moment of collision. Hence, adopting a convenient phrase of insurance law, the injured vessel has, under such circumstances, become a constructive total loss, and her owner is to be indemnified, not by the payment to him of the cost of repair, but of the value of his vessel."

The facts in the case of "The Reno," 134 Fed. 555, are not unlike those in the case at bar. The machinery was saved in that case and the award was made on the basis of the value of the hull. The rule is again stated in "Louisville and Cincinnati Packing Company v. United Coal Company, 223 Fed. 300. There the court of appeals said:

"Where the final claim for damages exceeds the value of the vessel at the time of the loss, the claim should be carefully scrutinized and the libellant held bound to show special circumstances to justify any such excess; and that good faith and reasonable prudence and good judgment have been exercised in making the repairs, citing The Venus, 17 Fed. 925."

It would be violating all rules of damages in collision cases to allow this man to recover a repair bill on a hull which was fifteen or sixteen years old, which cost him, four years ago, $350 and which was not worth by all the estimates, the cost of the repairs necessary to restore it to its condition before collision. In these circumstances $350 with interest should represent the damage to the hull.

In the case of "The Venus," *supra*, Judge Brown held that

"the ordinary rule would not admit of a recovery beyond the amount of a total loss, that is the full value of the vessel at the time it was sunk."

See also "The Sequoia," 132 Fed. 625.

As the appellee has recovered her engine, and has been allowed damages for its restoration, together with her cargo, equipment and demurrage loss, she should not be permitted to recover more than the value of the hull, which was not worth repairing. The testimony is clear that it was not worth to exceed what Alexander Brindle paid for it four years before. The award of $1050.00 should be reduced accordingly. No interest was claimed at any time in the trial court, and in view of the failure of the appellee to minimize her loss and dam-

age by having the boat seasonably repaired, so that the cost could be accurately determined by the actual repair bill or by accepting damages upon the basis of a constructive total loss, no interest should be awarded.

Respectfully submitted,

WINTER S. MARTIN,

Proctor for Appellants.